

APPENDIX 6

Devil's Lake, North Dakota

Final Integrated Planning Report and Environmental Impact Statement

CULTURAL RESOURCES PROGRAMMATIC AGREEMENT

General Information

PROGRAMMATIC AGREEMENT AMONG

THE U.S. ARMY CORPS OF ENGINEERS, ST. PAUL DISTRICT, THE NORTH DAKOTA STATE HISTORIC PRESERVATION OFFICER, THE BUREAU OF INDIAN AFFAIRS, GREAT PLAINS REGIONAL OFFICE, THE SPIRIT LAKE TRIBE, AND THE NORTH DAKOTA STATE WATER COMMISSION REGARDING IMPLEMENTATION OF FLOOD REDUCTION MEASURES AT DEVILS LAKE IN NORTH DAKOTA

[Final – September 2002]

WHEREAS, Devils Lake in northeastern North Dakota is a closed basin system until waters reach elevation 1446.5 feet above mean sea level (amsl) whereupon it overflows into the Stump Lakes, and at elevation 1459 feet amsl overflows from there via Tolna Coulee into the Sheyenne River, thence downstream to the Red River of the North, thence downstream to the Canadian border; and

WHEREAS, Devils Lake reached a historic high of 1448.04 feet amsl in 2001 and has started to overflow into Stump Lakes, and is at approximately 1447.1 feet amsl as of March 2002; and

WHEREAS, the U.S. Army Corps of Engineers, St. Paul District (Corps) is undertaking the “preconstruction engineering and design of an outlet from Devils Lake, North Dakota, to the Sheyenne River” (Outlet hereafter) in order to comply with the Congressional appropriation language of Fiscal Years 2000 and 2001; and,

WHEREAS, the Corps is also considering continued Infrastructure Protection in the form of relocations, levee construction, and road raises as a flood reduction alternative for the Devils Lake area; and

WHEREAS, outlet construction or infrastructure protection measures, or a combination of the two are possible elements of a flood reduction project at Devils Lake (Project hereafter); and

WHEREAS, “historic property” is defined as “any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register of Historic Places (National Register). This term includes artifacts, records, and remains that are related to and located within such properties. This term includes properties of traditional religious and cultural importance to an American Indian tribe that meet the National Register criteria. The term “eligible for inclusion in the National Register” includes both properties formally determined as such by the Secretary of the Interior and all other properties that meet National Register listing criteria; and

WHEREAS, the Corps has determined that the Project has the potential to have adverse effects on historic properties, but that all historic properties and project effects to them cannot be determined at this time, prior to approval of the Project; and

WHEREAS, the Spirit Lake Tribe is a consulting party and signatory to this Programmatic Agreement because the Tribe's Fort Totten Reservation and its exterior boundaries are partially within the Area of Potential Effects for this Project, including certain portions of Devils Lake and the Sheyenne River; and

WHEREAS, the Corps has consulted with the North Dakota State Historic Preservation Officer (NDSHPO), the Advisory Council on Historic Preservation (Council), the Bureau of Indian Affairs, Great Plains Regional Office (BIA), and the Spirit Lake Tribe, pursuant to Sections 800.14(b) and 800.14(f) of the regulations (36 CFR Part 800, Protection of Historic Properties) implementing Section 106 of the National Historic Preservation Act, as amended; and

WHEREAS, the North Dakota State Water Commission (NDSWC) is a consulting party and signatory to this Programmatic Agreement because, as the local cost-sharing sponsor of the Project, they will be responsible for the outlet's operation and maintenance if outlet construction is undertaken, and for partially funding monitoring and mitigation measures along the Sheyenne River; and

WHEREAS, the Corps notified the Council of its determination of adverse effect for this project and requested the Council to participate in the consultations to develop this Programmatic Agreement, but the Council chose not to participate; and

WHEREAS, the Corps will continue to consult with the Spirit Lake Tribe, the Hidatsa and Mandan of the Three Affiliated Tribes, the Northern Cheyenne Tribe, the Southern Cheyenne Tribe, the Crow Tribe, and the Turtle Mountain Band of Chippewa, to specifically solicit any concerns and comments they may have about the Project's potential effects on properties important to their history, culture, or religion, including traditional cultural properties;

NOW, THEREFORE, the Corps, the NDSHPO, the BIA, the Spirit Lake Tribe and the NDSWC agree that should the Corps and the NDSWC proceed with the Project, the Corps will ensure that the following stipulations are implemented to satisfy the Corps' Section 106 responsibilities with respect to the Project.

STIPULATIONS

The Corps will ensure that the following measures are carried out:

I. PROJECT'S AREA OF POTENTIAL EFFECTS

A. The Project's Area of Potential Effects (APE), if an outlet is selected, includes the construction zones and footprint of the Devils Lake outlet alignment, associated road raises, associated borrow, disposal and staging areas, the Dry Lake diversion channel alignments and

new flowage easement lands, a 50-meter-wide strip of land along each bank of the Sheyenne River from the outlet mouth at Peterson Coulee in Benson County downstream to the river's confluence with the Red River of the North in Cass County just north of the city of Fargo, and any wildlife and wetland mitigation lands acquired for the Project.

B. The Project's APE for Infrastructure Protection measures includes the communities of Churches Ferry, Fort Totten, and St. Michael, and rural areas where incremental relocations may occur; the levee construction work areas at the cities of Devils Lake and Minnewaukan, and at the Grafton State Military Reservation; the road raise work areas in Grahams Island State Park and along Highways 2, 57, 281, 19, 20, BIA 1 and BIA 6; any work areas where Canadian Pacific Railroad and Burlington Northern Railroad track will be raised; the alignment to which Highway 1 will be relocated; levee construction work areas along roads currently acting as dams on the Fort Totten Reservation; and any borrow, disposal and staging areas associated with any of the above construction.

II. IDENTIFICATION AND EVALUATION OF HISTORIC PROPERTIES

A. In 1997, The 106 Group Ltd., under contract with the Corps, conducted a baseline literature and records search of the site files and previous survey reports at the Historic Preservation Division of the State Historical Society of North Dakota for the Devils Lake basin and the Sheyenne River valley from upstream of Peterson Coulee to the Red River of the North at Fargo, North Dakota (ref. Ketz and Schmidt, 1997, *Literature Search and Records Review for the Devils Lake Feasibility Study, Devils Lake Basin and Sheyenne River, North Dakota*). Known site and site lead locations were plotted on one set of U.S. Geological Survey 7.5' topographic quadrangles for the basin and river valley; previously surveyed areas were plotted on a second set of maps. A database of basic site information was also prepared for the Corps. These materials are on file at the St. Paul District, U.S. Army Corps of Engineers office in St. Paul, Minnesota.

B. The Corps shall ensure that Phase I cultural resources investigations of the Project's outlet alignment and infrastructure protection features are conducted prior to project-related construction at or use of those areas. Each Phase I investigation shall include a literature and records search and an intensive pedestrian survey to identify all historic properties in the areas to be surveyed. Lands in the Project's area of potential effects along the Sheyenne River will be inventoried according to Section V of this Programmatic Agreement, if an outlet is constructed. In addition, the Corps will consult with the Spirit Lake Tribe, the Hidatsa and Mandan of the Three Affiliated Tribes, the Turtle Mountain Band of Chippewa, the Crow, and the Northern and Southern Cheyenne to identify sites in the Project's APE that one or more of these tribal groups believes to be traditional cultural properties (TCPs) as defined in National Park Service Bulletin 38 *Guidelines for Evaluating and Documenting Traditional Cultural Properties*.

C. The Corps, in consultation with the NDSHPO, shall evaluate all properties identified through the Phase I investigations using the National Register of Historic Places eligibility criteria given in 36 CFR Part 60. In the event that an Indian tribe contacts the Corps regarding its recognition of a TCP within the Project's APE, the Corps shall notify the NDSHPO and initiate discussions

with all concerned parties to evaluate whether the property is a TCP which meets the National Register criteria.

D. The Corps shall ensure that qualified professionals meeting the *Secretary of the Interior's Guidelines for Archaeology and Historic Preservation* (48 FR 44738-39) will conduct all identification and evaluation work related to this Project, to include archeological surveys and testing, historic structure inventories and evaluation, and documentation, etc. Tribal members knowledgeable in their tribe's history and traditional culture are considered qualified professionals for the purpose of identifying and evaluating tribally important sites within the Project's APE.

E. If the Corps and the NDSHPO agree that a property is or is not eligible for inclusion on the National Register, then the property shall be treated accordingly.

F. If the Corps and the NDSHPO disagree regarding a property's National Register eligibility, prior to the start of any Project-related construction at or in the vicinity of that site, the Corps shall obtain a formal Determination of Eligibility from the National Park Service's Keeper of the National Register, whose decision shall be final.

G. If the Corps and the Spirit Lake Tribe, the Hidatsa and Mandan of the Three Affiliated Tribes, the Turtle Mountain Chippewa, the Crow, the Northern Cheyenne, or the Southern Cheyenne disagree about the eligibility of a traditional cultural property, the Corps will request a formal determination of eligibility from the Keeper of the National Register, whose decision shall be final.

H. If any human burials are encountered during the archeological investigations of the Project's APE, the Corps and its contractors will follow the Native American Graves Protection and Repatriation Act (NAGPRA) if the burials are on federal or tribal lands or will follow North Dakota Century Code 23-06-27, "Protection of Human Burial Sites, Human Remains, and Burial Goods" and Chapter 40-02-03, "Protection of Prehistoric and Historic Human Burial Sites, Human Remains, and Burial Goods," for burials on all other lands.

I. The Corps shall submit all draft reports prepared pursuant to stipulations of this Programmatic Agreement to the NDSHPO, the BIA, concerned Indian tribes, and the NDSWC, as appropriate, for a 30-day review period. If any of these parties does not comment on the draft report within the specified time, the Corps will assume that party has no comments on that particular document.

J. The Corps shall ensure that all final reports resulting from actions pursuant to the stipulations of this Programmatic Agreement are responsive to contemporary NDSHPO report standards. Precise locational data may be provided only in a separate appendix if it appears that its release could jeopardize historic properties, including traditional cultural properties, consistent with National Register Bulletin 39, *Guidelines for Restricting Information about Historic and Prehistoric Resources*.

III. TREATMENT OF HISTORIC PROPERTIES

The Corps will adhere to the following guidelines when dealing with historic properties, including traditional cultural properties, in the Project's Area of Potential Effects.

A. Avoidance. The preferred treatment for all historic properties is avoidance of effects by the Project. The Corps shall, to the extent practicable, avoid historic properties either through Project design changes, use of temporary fences or barricades during construction, realignments, or other measures that will protect historic properties.

B. Reduction of Effects on Properties Preserved In Place. When the Corps determines that complete avoidance of historic properties is not practicable, the Corps shall explore ways to reduce the extent of the adverse effects on the properties. Exploration of ways to reduce adverse effects will include the consideration of preservation in place of historic properties through partial avoidance of the property or the protection of historic properties against impacts by Project-related activities in close proximity to the property.

C. Mitigation of Adverse Effects.

1. When the Corps, in consultation with the NDSHPO, the BIA, concerned Indian tribes and the NDSWC, determines that Project activities will have an adverse effect on a historic property and that avoidance or in place preservation is not feasible, the Corps shall ensure that a mitigation plan is developed for these properties in accordance with Stipulations III.C.4, III.C.6, III.C.7, and V.

2. The Corps shall ensure that qualified professionals meeting the *Secretary of the Interior's Standards and Guidelines for Archaeology and Historic Preservation* (48 FR 44738-39) are used to develop and implement all mitigation plans.

3. Unless the NDSHPO, the BIA, concerned Indian tribes, or the NDSWC objects within 30 days of receipt on the adequacy, appropriateness or extent of any mitigation plan, the Corps shall ensure that the mitigation plan is implemented by the Corps or its representative(s). The Corps shall revise the mitigation plan to address comments and recommendations provided by the NDSHPO, the BIA, concerned Indian tribes and the NDSWC so long as the Corps and these parties can agree that the plan is technically feasible and economically prudent. Should the Corps and any of these parties not agree, the Corps will request the Council's comments in accordance with Stipulation VII, Dispute Resolution.

4. Archeological Sites. When avoidance or preservation in place of archeological properties is not feasible, the Corps shall prepare a mitigation plan in consultation with the NDSHPO, the BIA, and concerned Indian tribes.

a. Archeological Data Recovery. The Corps shall ensure that any historic property whose preservation in place is not feasible and that is eligible to the National Register solely under criterion D, is subjected to data recovery, based on a data recovery plan developed in consultation with the NDSHPO, the BIA, concerned Indian tribes, and interested parties. All

data recovery plans shall be consistent with the *Secretary of the Interior's Standards and Guidelines for Archeological Documentation* (48 FR 44734-37) and take into account the Council's publication *Treatment of Archeological Properties*. Each data recovery plan shall specify, at a minimum:

1. The property, properties, or portions of properties where data recovery is to be carried out;
2. The research questions to be addressed through the data recovery, with an explanation of their relevance and importance;
3. The methods to be used, with an explanation of their relevance to the research questions;
4. The methods to be used in analysis, data management, and dissemination of data, including a schedule;
5. The proposed disposition of recovered materials and records;
6. Proposed methods for involving the interested public in the data recovery;
7. Proposed methods for disseminating results of the data recovery to the interested public; and
8. A proposed schedule for the submission of progress reports to the NDSHPO, and where applicable, the BIA, concerned tribes and interested parties.

b. The Corps shall ensure that each data recovery plan is submitted to the NDSHPO, the BIA, and any tribes and interested parties whose interests pertain to the property involved for 30 days review and comment.

5. Burial Sites. If human remains and/or associated grave goods are encountered in the Project area during either the historic properties identification, evaluation, or mitigation activities or during Project construction, the Corps shall follow the State of North Dakota's burial laws to the extent that they are not inconsistent with Federal law and regulations. The Corps shall develop a treatment plan for the burial(s) in consultation with the NDSHPO, the North Dakota Intertribal Reinterment Committee, and concerned Indian tribes.

6. Traditional Cultural Properties.

a. If a Traditional Cultural Property (TCP) is identified within the Project's area of potential effects, the Corps shall develop a treatment plan for the TCP in consultation with the Indian tribe that could be affected by Corps proposed Project activity at the specific historic site or property involved. The plan will cover analysis of treatment options and selection of a recommended treatment for the TCP and the measures which will be undertaken by the Corps to ensure that the plan is implemented.

b. Access to TCP's within the proposed outlet alignment construction zone will not be allowed during construction for safety reasons. TCP's located within the Project's area of potential effects but outside of the Project construction zone will be accessible during construction.

c. The Corps shall submit the final plan to the NDSHPO, the BIA, and to the affected Indian tribe and shall implement the plan in accordance with the procedures outlined in the plan, if no formal objections are received within 30 days following its distribution.

d. Should a formal objection to the final treatment plan be submitted within 30 days following its distribution, the Corps, the NDSHPO, the BIA and the affected Indian tribe shall attempt to resolve the objection. If the Corps, the NDSHPO, and the affected Indian tribe have not resolved the objection within 90 days, the Corps shall request the comments of the Council in accordance with Stipulation VII, Dispute Resolution.

7. Architectural Sites.

a. If preservation in place is not feasible, the Corps will provide the NDSHPO with a report summarizing the alternatives considered to avoid adverse effects to architectural historic properties. In the report, the Corps will propose measures that will avoid, minimize, or mitigate adverse effects to these properties. The NDSHPO may request that the Corps consider other alternatives to avoid, minimize or mitigate adverse effects.

b. After the Corps and NDSHPO agree on a proposed alternative to mitigate adverse effects, the Corps, in consultation with the NDSHPO, will develop a Memorandum of Agreement (MOA) for mitigation of the adverse effects to specific historic properties or property types resulting from Project implementation. Once the Corps and NDSHPO have finalized the MOA, a copy will be filed with the Council.

D. Curation. The Corps or its representative, in consultation with the NDSHPO, shall ensure that all materials and records resulting from the survey, evaluation, and data recovery conducted for the Project will be curated in accordance with 36 CFR Part 79 “Curation of Federally-Owned and Administered Archeological Collections.” All material and records recovered from non-Federally owned land shall be maintained in accordance with 36 CFR Part 79 until their analysis is complete and, if necessary, are returned to their owner(s).

IV. DISCOVERIES DURING PROJECT IMPLEMENTATION

A. Should an unidentified property that may be eligible for inclusion on the National Register be discovered during Project construction, the Corps, if feasible, will cease all work in the vicinity of the discovered property until it can be evaluated pursuant to guidelines in Stipulation II of this Programmatic Agreement. If the property is determined eligible, the Corps shall comply with the provisions of Stipulation III. Project actions which are not in the area of the discovery may proceed while the consultation and any necessary evaluation and mitigation work is conducted.

B. Should a previously unidentified human burial be discovered during Project construction, the Corps will follow the State of North Dakota’s burial laws to the extent that State law is not inconsistent with Federal law and regulations.

V. INVENTORY, EVALUATION, MONITORING AND MITIGATION OF PROPERTIES ALONG THE SHEYENNE RIVER DURING OUTLET OPERATION

A. A baseline river-based reconnaissance survey to locate cultural resource sites visibly eroding from the cutbanks of the Sheyenne River prior to outlet construction and operation was conducted in 2000-2001 (ref. Stine and Kulevsky, 2001 draft, *Cultural Resources Reconnaissance Survey of the Banks of the Sheyenne River From the Red River to Peterson Coulee, in Cass, Richland, Ransom, Barnes, Griggs, Nelson, Eddy, Wells, and Benson Counties, North Dakota*). The reconnaissance survey covered both banks of the Sheyenne River, minus Lake Ashtabula, from the outlet at Peterson Coulee in Benson County, downstream to the Sheyenne River's confluence with the Red River of the North in Cass County, North Dakota.

B. During operation of the Devils Lake outlet, the Corps or its contractor will conduct similar river-based reconnaissance surveys of the Sheyenne River's cutbanks in even-numbered years to determine if any additional cultural resources sites are visibly eroding from the riverbanks as a result of outlet operation.

C. Cultural resource sites located during the baseline Sheyenne River cutbank reconnaissance survey and subsequent cutbank monitoring surveys will be inventoried, including their horizontal and vertical extent and physical integrity, and have their National Register eligibility evaluated, provided landowner permission to enter the property and conduct such work can be obtained.

D. As part of the inventory and evaluation process, the Corps or its contractor will prepare detailed baseline map GIS data layers for each site showing the site area in relation to the river bank and other prominent natural features in the immediate vicinity. Datum points from which to measure future bank erosion will be installed at these sites. Erosion measurements at these sites will be made in odd-numbered years and will be incorporated into a cumulative erosion GIS data layer for each site.

E. The Corps, in consultation with the NDSHPO, the BIA, concerned Indian tribes, the NDSWC, and interested parties, shall determine an appropriate mitigation plan for those sites along the Sheyenne River determined eligible to the National Register where Project outlet operation has exacerbated bank erosion or resulted in overbank flooding. Mitigation will include bank protection, data recovery through formal archeological excavation, or other appropriate measures.

F. Hard copies of inventory, evaluation, monitoring and mitigation reports and documents prepared under this section of the Programmatic Agreement will be provided to the NDSHPO, the NDSWC, the BIA, and concerned Indian tribes, for their review and comment or information, as appropriate.

VI. PUBLIC INVOLVEMENT

A. The Corps shall take advantage of Project newsletters and the public meetings held in connection with preparation of the Integrated Planning Report/Environmental Impact Statement (EIS) for the Project to disseminate and obtain information from the general public on historic

properties within the Project area, including potential adverse effects to historic properties which may result from construction and operation of the Project. The final Integrated Planning Report/EIS will include a copy of the signed Programmatic Agreement for this Project.

B. Cultural resources reports and documentation related to the Project will be available for public inspection at the St. Paul District, Corps of Engineers office in St. Paul, Minnesota, and at the NDSHPO in Bismarck, North Dakota. Information on the specific locations of historic properties will be withheld from information made available to the public to the extent consistent with Section 304 of the National Historic Preservation Act and the Freedom of Information Act, if it appears that this information could jeopardize the historic properties.

C. Public Objections. The Corps shall review and attempt to resolve timely and substantive public objections or comments related to the implementation of the Programmatic Agreement or other historic preservation issues. Public objections and comments shall be considered timely when they are provided within the review periods specified for the particular document. The Corps shall consult with the objecting party, the NDSHPO, and as appropriate with the Council, to resolve objections. Project actions which are not the subject of the objection may proceed while the consultation is conducted.

VII. DISPUTE RESOLUTION

A. Should the NDSHPO, the BIA, an Indian tribe, or the NDSWC object to any plans, documents, or reports required under the terms of this Programmatic Agreement within 30 days after receipt, the Corps shall consult with the objecting party to resolve the objection. If the Corps determines that the objection cannot be resolved, the Corps shall forward all documentation relevant to the dispute to the Council. Within 45 days after receipt of all pertinent documentation, the Council will provide the Corps with comments and recommendations, which the Corps will take into account in reaching a final decision regarding the dispute.

B. Any recommendation or comment provided by the Council will be understood to pertain only to the subject of the dispute. The Corps' responsibility to carry out all actions under this agreement that are not the subject of the dispute will remain unchanged.

VIII. ANNUAL REPORTS

Upon execution of the Project Cooperation Agreement, the Corps shall prepare annual reports summarizing the status of compliance with the terms of this Programmatic Agreement and a summary of the completed activities for the past year and the proposed activities for the next year to the NDSHPO, the Council, the BIA, concerned Indian tribes, the NDSWC and interested parties. Reports shall be submitted by January 31st of every year that the Devils Lake outlet is in operation.

IX. AMENDMENTS

Any party to this Programmatic Agreement may request that it be amended, whereupon the parties will consult in accordance with 36 CFR Part 800.6(c)(7) to consider such amendment.

X. TERMINATION

Any signatory party to this Programmatic Agreement may terminate it by providing thirty (30) days notice to the other parties, provided that the parties will consult during the period prior to termination to seek agreement on amendments or other actions that would avoid termination. In the event of termination, the Corps will comply with 36 CFR Part 800.3 through 800.6 with regard to individual undertakings covered by this Programmatic Agreement.

XI. ANTI-DEFICIENCY PROVISION

All obligations on the part of the Corps shall be subject to the availability and allocation of appropriated funds for such purposes. Should the Corps be unable to fulfill the terms of this agreement, it will immediately notify the Council, the NDSHPO, and other signatory parties, and consult to determine whether to amend or terminate the Programmatic Agreement pending the availability of resources.

XII. SUNSET CLAUSE

This Programmatic Agreement will continue in full force and effect until construction of any implemented project is completed and all terms of this Programmatic Agreement are met, unless the Project is terminated or authorization is rescinded.

Execution and implementation of this Programmatic Agreement evidences that the Corps has satisfied its Section 106 responsibilities for all aspects of this undertaking.

ST. PAUL DISTRICT, U.S. ARMY CORPS OF ENGINEERS

BY: _____ DATE: _____
Col. Robert L. Ball, District Engineer

NORTH DAKOTA STATE HISTORIC PRESERVATION OFFICER

BY: _____ DATE: _____
Merlan E. Paaverud, Jr., State Historic Preservation Officer

SPIRIT LAKE TRIBE

BY: _____ DATE: _____
Phillip Longie Jr., Tribal Chairman

U.S.D.I. BUREAU OF INDIAN AFFAIRS, GREAT PLAINS REGIONAL OFFICE

BY: _____ DATE: _____
Cora L. Jones, Regional Director

NORTH DAKOTA STATE WATER COMMISSION

BY: _____ DATE: _____
Dale Frink, State Engineer and Secretary of the State Water Commission

Concur:

TURTLE MOUNTAIN BAND OF CHIPPEWA INDIANS

BY: _____ DATE: _____
Richard Monette, Tribal Chairman

THREE AFFILIATED TRIBES – MANDAN, HIDATSA AND ARIKARA NATION

BY: _____ DATE: _____
Tex Hall, Tribal Chairman

NORTHERN CHEYENNE TRIBE

BY: _____ DATE: _____
Geri Small, Tribal President

CROW TRIBE

BY: _____ DATE: _____
Carl Venne, Tribal Chairman

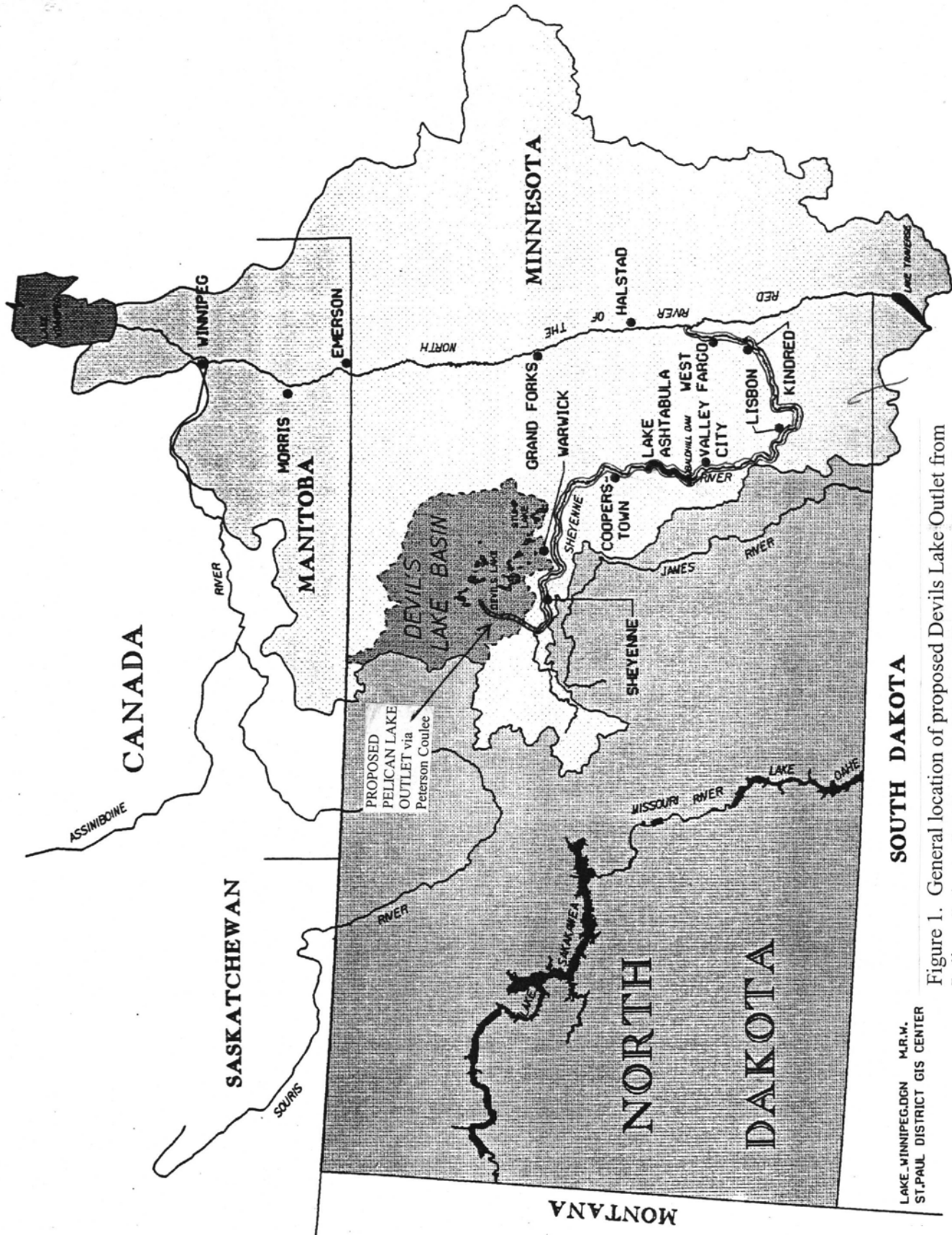


Figure 1. General location of proposed Devils Lake Outlet from Pelican Lake to the Sheyenne River via Peterson Coulee, and its area of potential effect (outlet alignment and banks of the Sheyenne River).

Figure 1

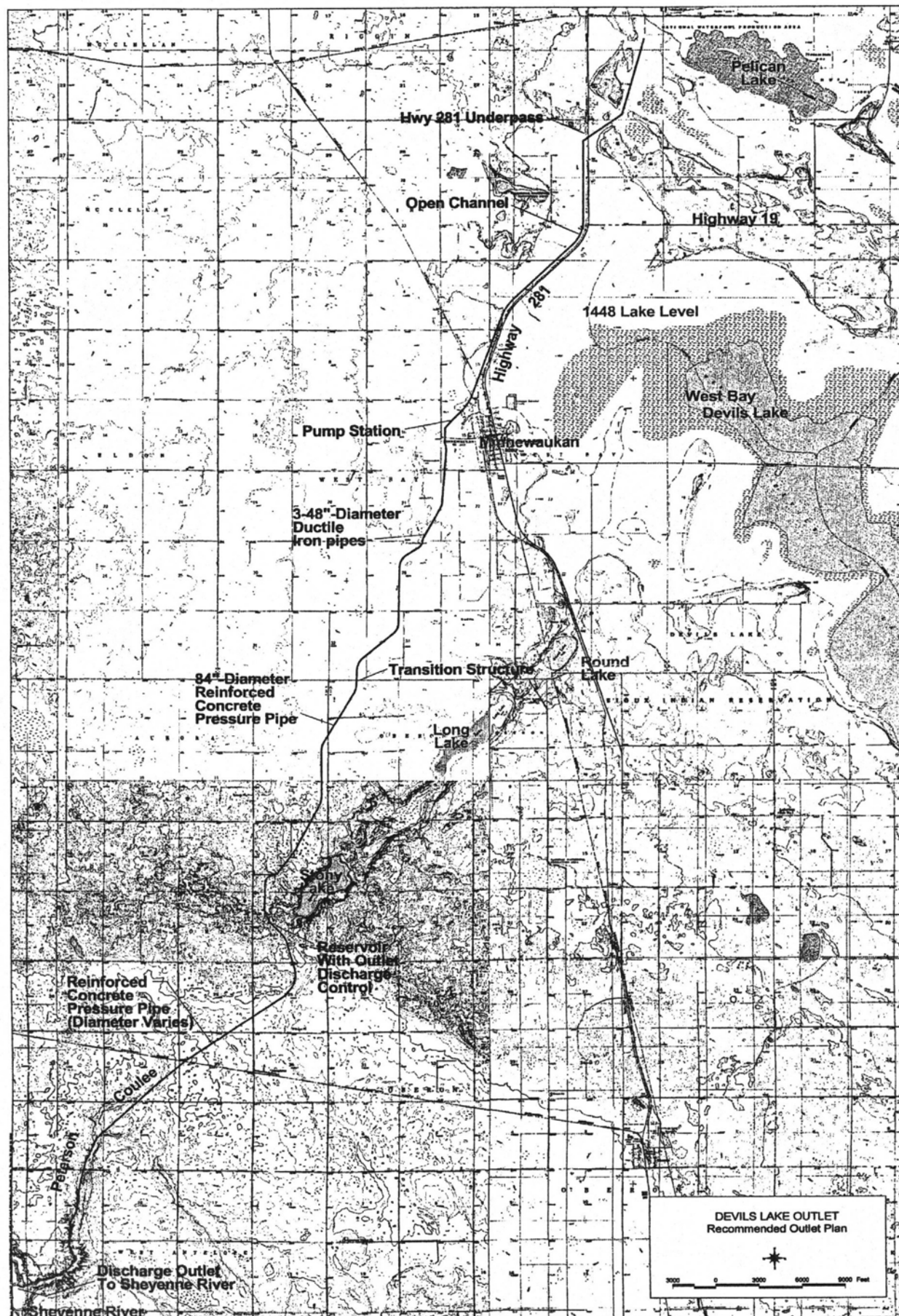


Figure 2. Pelican Lake Outlet Alignment.